

STATE OF MICHIGAN
COURT OF APPEALS

TIMOTHY WAYNE MCCLELLAND,

Plaintiff-Appellant,

v

DEPARTMENT OF STATE POLICE,

Defendant-Appellee.

UNPUBLISHED

January 12, 2016

No. 323875

Grand Traverse Circuit Court

LC No. 2014-030438-CZ

Before: RONAYNE KRAUSE, P.J., and GADOLA and O'BRIEN, JJ.

PER CURIAM.

Plaintiff appeals by right from an order denying his motion for a declaratory judgment that would relieve him of his obligation to register under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.* We affirm.

On January 3, 1995, plaintiff pleaded guilty in the Mason Circuit Court to one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c. In exchange for his plea, the trial court sentenced defendant to one year in jail and five years on probation. SORA became law on July 13, 1994, but did not take effect until October 1, 1995. 1994 PA 295. Under SORA, CSC II is a tier III offense, MCL 28.722(w)(v), requiring lifetime registration as a sex offender, MCL 28.725(12).¹ Because plaintiff was still serving the sentence imposed for a listed offense when SORA became effective, he was required to register as a sex offender, MCL 28.723(1)(b), or risk up to four years' imprisonment, or up to a \$2,000 fine, or both, MCL 28.729(1). Consequently, plaintiff first registered under SORA on November 21, 1995.

¹ In *Doe v Snyder*, 101 F Supp 3d 672 (ED Mich, 2015), and *Doe v Snyder*, 101 F Supp 3d 722 (ED Mich, 2015) the United States District Court for the Eastern District of Michigan recently held that certain requirements of SORA, found in MCL 28.725(1)(f) and (g), 725a(7), 727(1)(h), (i), and (j), 734, and 735, were either unconstitutional, unconstitutional as applied, or unconstitutionally retroactive. Plaintiff does not base his claims on any of these subsections; rather, he contends that SORA is constitutionally infirm in general, primarily because it is punitive in nature.

On July 18, 2014, plaintiff petitioned the Grand Traverse Circuit Court for a declaratory judgment exempting him from registration under SORA and ordering defendant to delete plaintiff's personal information from the public sex-offender registry. Plaintiff argued that he was not informed that he would be subject to SORA's registration requirements if he pleaded guilty, which violated his right to due process, called into question whether his plea was knowingly made, and prejudiced the outcome of the proceedings. Defendant maintained that plaintiff was not entitled to the requested relief because he had failed to follow the procedures established by MCL 28.728c for judicial review of SORA's registration requirements, and even if plaintiff had followed the procedures, he was not entitled to relief because he did not meet the statute's substantive requirements. Defendant acknowledged plaintiff's right to challenge the effectiveness of his counsel, but noted that the Grand Traverse Circuit Court lacked jurisdiction over a plea-based conviction in the Mason Circuit Court.

The Grand Traverse Circuit Court denied plaintiff's petition, concluding that plaintiff was properly registered under SORA. The court found that while recent caselaw supported plaintiff's claim that he should have been informed of the registration consequences of his guilty plea, the caselaw did not have retroactive effect and, consequently, did not apply to plaintiff's 1995 plea-based conviction.

Plaintiff first argues that the trial court erred by denying his petition for a declaratory judgment. We disagree. We review a decision on a declaratory judgment *de novo*. *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 469; 556 NW2d 517 (1996).

MCR 2.605(A) governs a trial court's authority to issue a declaratory judgment, and states the following:

(1) In the case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

(2) For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment.

Plaintiff is seeking a declaration of his and defendant's rights and responsibilities under SORA.² Plaintiff's 1995 plea-based conviction for CSC II, a tier III offense, MCL 28.722(w)(v),

² Defendant asserts that plaintiff is collaterally attacking his Mason Circuit Court conviction and that the Grand Traverse Circuit Court did not have jurisdiction to grant plaintiff the relief he requests. Plaintiff claims that the order in *People v Spencer*, 493 Mich 939; 829 NW2d 592 (2013), is authority for his petition for a declaratory order. Our Supreme Court advised the defendant in *Spencer* that the "proper means of obtaining relief, if any, for the retroactive application of new restraints on liberty imposed by the amendments to the SORA would be for

requiring lifetime registration under SORA, MCL 28.725(12), clearly subjects plaintiff to the registration requirements of SORA. The critical inquiry is whether there is a legal basis to relieve plaintiff of SORA's requirements. We conclude that there is no such basis.

In the trial court, plaintiff sought relief from registration under SORA on the basis of this Court's holding in *People v Fonville*, 291 Mich App 363; 804 NW2d 878 (2011), arguing that his counsel was ineffective for failing to inform him that his plea would require him to register as a sex offender.³ On appeal, however, plaintiff simply presumes that his counsel's performance was deficient and contends that counsel's failure to inform him of the registration consequences of his plea denied him his due process rights under the Fourteenth Amendment. US Const, Am XIV. Whether a party has been afforded due process is a question of law that we review de novo. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277; 831 NW2d 204 (2013).

Because a guilty plea constitutes a waiver of several constitutional rights, "the Due Process Clause of the Fourteenth Amendment requires that the plea be voluntary and knowing." *People v Cole*, 491 Mich 325, 333; 817 NW2d 497 (2012), citing *McCarthy v United States*, 394 US 459, 466; 89 S Ct 1166; 22 L Ed 2d 418 (1969). In assessing voluntariness, courts consider whether a defendant entering a plea was fully aware of the direct consequences of the plea. *Cole*, 491 Mich at 333. "The most obvious direct consequence of a conviction is the penalty to be imposed. It is, therefore, well-recognized that the defendant must be apprised of the sentence that he will be forced to serve as the result of his guilty plea and conviction." *Id.* at 334 (quotation marks and citation omitted). In *Cole*, our Supreme Court held that "when the governing criminal statute mandates that a trial court sentence a defendant to lifetime electronic monitoring, due process requires the trial court to inform the defendant entering the plea that he or she will be subject to mandatory lifetime electronic monitoring." *Id.* at 337.

the defendant to raise his ex post facto claims in a civil action for declaratory judgment" *Id.* Plaintiff appears to be doing just that, and defendant has not convinced us that the Grand Traverse Circuit Court did not have jurisdiction to determine whether plaintiff's allegations regarding SORA entitled him to his requested relief.

³ Although plaintiff does not reassert his ineffective assistance claim on appeal, we note that any such argument would be unavailing. In *Padilla v Kentucky*, 559 US 356, 369; 130 S Ct 1473; 176 L Ed 2d 284 (2010), the United States Supreme Court indicated that when the consequences of a guilty plea are clear, the duty to give correct advice is equally clear. In *Fonville*, this Court extended the *Padilla* Court's reasoning to an attorney's failure to warn a defendant when registration under SORA is a consequence of conviction. *Fonville*, 291 Mich App at 394-395. However, neither *Fonville* nor *Padilla* is retroactively applicable to plaintiff's 1995 plea. See *People v Gomez*, 295 Mich App 411, 419; 820 NW2d 217 (2012) (holding that both federal and Michigan retroactivity analysis "require that the new rule of criminal procedure announced in *Padilla* be applied prospectively only"). Plaintiff cannot base a successful claim of ineffective assistance on his counsel's violation of a rule of criminal procedure that did not exist, and therefore was not part of the "prevailing professional norms," *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984), at the time of plaintiff's plea agreement.

Plaintiff relies on the holding in *Cole* to argue that due process required his counsel to inform him of the registration consequences of his plea. However, plaintiff's reliance on *Cole* is misplaced. *Cole* is easily distinguished from the instant case by the fact that lifetime electronic monitoring constitutes additional punishment for committing first-degree criminal sexual conduct, MCL 750.520b(2)(d); *Cole*, 491 Mich at 336, whereas registration under SORA is not a penalty or punishment, *People v Golba*, 273 Mich App 603, 620; 729 NW2d 916 (2007). Moreover, this Court has consistently held that no due process rights are implicated by SORA. See *Id.* ("SORA does not affect a person's liberty by imposing additional confinement beyond the statutorily authorized maximum penalty."); *In re Wentworth*, 251 Mich App 560, 565; 651 NW2d 773 (2002) ("[N]o due process rights are implicated by the SORA.").

Plaintiff claims that registration under SORA violates the Double Jeopardy and Ex Post Facto Clauses of the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 15; US Const, art I, § 10; Const 1963, art 1, § 10. Plaintiff did not raise these issues below, so they are unpreserved for appellate review. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). We review unpreserved constitutional issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

The United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. The guarantees against double jeopardy protect a defendant against both successive prosecutions for the same offense and multiple punishments for the same offense. *People v Gibbs*, 299 Mich App 473, 489; 830 NW2d 821 (2013). The Ex Post Facto Clause was intended in part "to secure substantial personal rights against arbitrary and oppressive legislation." *People v Pennington*, 240 Mich App 188, 192; 610 NW2d 608 (2000). The test for determining whether a law violates the Ex Post Facto Clause is (1) "whether the law is retrospective, i.e. whether it applies to events that occurred before its enactment" and (2) "whether it disadvantages the offender" by making punishable an act that was not, increasing a punishment, making an act a more serious offense, or allowing a prosecutor to convict on less evidence. *People v Slocum*, 213 Mich App 239, 243; 539 NW2d 572 (1995).

To begin, plaintiff's Ex Post Facto Clause argument is meritless because the Legislature enacted SORA on July 13, 1994, before plaintiff committed the criminal offense on September 16, 1994. See 1994 PA 295. Although the law did not take effect until October 1, 1995, plaintiff cannot persuasively argue that the law was retrospective because his criminal conduct did not occur before its enactment. See *Slocum*, 213 Mich App at 243. Moreover, to conclude that SORA violates the Double Jeopardy and Ex Post Facto Clauses, we would first have to determine that registration under SORA constitutes a punishment, which we have consistently declined to do. See, e.g., *Golba*, 273 Mich App at 620; *Pennington*, 240 Mich App at 197; *In re Ayers*, 239 Mich App 8, 19; 608 NW2d 132 (1999). Further, this Court recently analyzed SORA using the two-part analytical process set forth in *Smith v Doe*, 538 US 84, 92-106; 123 S Ct 1140; 155 L Ed 2d 164 (2003), and adopted by *People v Earl*, 495 Mich 33; 845 NW2d 721 (2014), and again concluded that the Legislature did not intend SORA as a punishment, and that SORA does not constitute punishment as generally applied. *People v Temelkoski*, 307 Mich App

241, 260-270; 859 NW2d 743 (2014)⁴; see also *People v Tucker*, ___ Mich App ___, ___; ___ NW2d ___ (2015); slip op at 11, 19-20 (concluding that SORA registration is not punishment and that the defendant did not meet his burden of proving that school safety zones and in-person reporting requirements were punitive). Plaintiff gives us no reason to revise our position. Accordingly, compliance with SORA’s registration requirements does not violate the Double Jeopardy and Ex Post Facto Clauses.

Plaintiff erroneously asserts that there is no legal basis requiring him to register under SORA and erroneously assumes that he has to consent to proceedings initiated in response to any failure on his part to comply with SORA’s registration requirements. However, plaintiff’s 1995 guilty plea to a tier III offense provided the legal basis for his required registration under SORA. See MCL 28.725(12). If plaintiff fails to comply with the registration requirements, SORA requires defendant to take certain steps, including seeking a warrant for plaintiff’s arrest, when appropriate. MCL 28.728a(1)(d). Plaintiff is thus legally obligated to comply with SORA’s registration requirements, and defendant is legally required to respond to plaintiff’s failure to do so, regardless of whether plaintiff consents.

In sum, we conclude that the trial court did not err by denying plaintiff’s petition for a declaratory judgment. Plaintiff’s 1995 plea-based conviction subjects him to SORA’s registration requirements, and neither SORA’s provisions nor caselaw provide plaintiff grounds for relief from those requirements.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Michael F. Gadola
/s/ Colleen A. O'Brien

⁴ On December 18, 2015, our Supreme Court granted Temelkoski’s application for leave to appeal to consider, in part, “whether the requirements of [SORA] amount to ‘punishment.’ ” *People v Temelkoski*, ___ Mich ___; ___ NW2d ___ (2015).